BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The opinion of the Supreme Court of North Carolina sought to be reviewed is reported in 224 N. C., page 645; 31 S. E. 2d 920, and appears in the record filed herein beginning on page 84 and continuing through page 90, inclusive.

Jurisdiction

Petitioner contends that under the Fourteenth Amendment to the Constitution of the United States, which in effect provides that no person shall be deprived of his life, liberty or property without due process of law, he is entitled to have the opinion of the North Carolina Supreme Court reviewed on the grounds that he has been convicted and sentenced to prison:

1. For a crime that was in fact not committed.
2. On the grounds of insufficient evidence.

1. No Crime Was Committed As Charged in the Bill of Indictment

The bill of indictment (R. 2) charges the petitioner with larceny of waste paper of the value of more than Fifty Dollars ($50.00) and the receiving of the same knowing it to have been stolen from the Junior Chamber of Commerce, alleged donee and owner. If the Junior Chamber of Commerce did not own the paper, then the petitioner was wrongfully convicted of the theft of the paper from said organization and also of the charge of receiving the same. In the case at bar Justice Devin, writing for the Court, lays down this phase of the law in the opinion:

> "It is true the allegation of *ownership* of property described in the bill of indictment must be proven

> substantially as laid, else a fatal variance would result and this would be available on a motion of nonsuit."
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> *State* v. *Weinstein*, 224 N. C. 645, 31 S. E. 2d 920.

The petitioner contends that the title to the paper had not passed at the time of the alleged theft, from the various citizens donating the same to the Junior Chamber of Commerce, alleged donee. The evidence is that people of Raleigh were requested by the Junior Chamber of Commerce to donate or give scrap paper to this organization. The paper was placed in bundles on the curb adjacent to the various homes in the city. Now comes the question is this a sufficient constructive delivery of the gift? The petitioner contends that it is not. Any citizen could have decided to send the magazines to an Army camp or made some other disposition of the same and could have moved the paper back into his or her home. The petitioner contends that the people had not completely surrendered the bundles or relinquished control over them. Again in the opinion of the North Carolina Supreme Court in the case at bar it is said:

> "In order to pass title there must have been both an intention to give and a delivery. While the delivery may be actual or constructive, the donor's surrender of the property must be complete and his control relinquished."
>
> *State* v. *Weinstein*, 224 N. C. 645, 31 S. E. 2d 920.

It is the contention of the petitioner that the various citizens of the city had and retained control of the bundles of paper until they were actually picked up by the drivers of city trucks, the agents designated to collect the paper. If this be true, then the Junior Chamber of Commerce did not own the paper at the time of the alleged theft for the reason that title had not passed to the organization. At

most, the placing of the bundles on the curb by various people to be collected in the *future,* at a later hour or date, was only a promise to give. This is not sufficient to pass title.

> "A gift cannot be made to take effect in the future. This amounts only to a *promise* or an agreement to make a gift. An intention of the donor to give is not alone sufficient. The intention must be executed by a *complete* and *unconditional* delivery. The transaction must show a completely executed transfer to the donee of the present right of property and the possession."
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> *Thomas* v. *Houston,* 181 N. C. 91.

No title to the paper passed to the Junior Chamber of Commerce; the Junior Chamber of Commerce did not own the paper as alleged in the bill of indictment; there was a fatal variance between the charge and the evidence and no crime was committed. This fact brings this case clearly within the jurisdiction of the Supreme Court of the United States under the due process clause of the Fourteenth Amendment to the Constitution. The following authorities are in point.

> "To sustain a conviction on the ground that the evidence supports a charge not made would be a sheer denial of due process."
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> *Thornhill* v. *The State of Alabama,* 310 U. S. 88-106, 84 Law. Ed. 1093;
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> *Jonge* v. *The State of Oregon,* 299 U. S. 353-366, 81 Law. Ed. 278.

2. The Petitioner Was Convicted and Sentenced On Totally Insufficient Evidence

In this connection the Supreme Court of the United States has held:

> "A question of law arising out of the contention that there was no evidence whatever to support a finding

of fact as the result of which a Federal Right was denied is open to review in the Federal Supreme Court on a writ of error to a State Court, if the evidence is in the record."

Creswill v. *Grand Lodge K. of P.*, 225 U. S. 246, 32 Sup. Ct. Rep. 822.

And again:

"In determining the legal effect of certain facts as a deprivation of one's legal rights under the Fourteenth Amendment, the Supreme Court is at full liberty to consider the facts as was the State Supreme Court."

Truax v. *Corrigan*, 257 U. S. 312, 42 Sup. Ct. Rep. 124.

The adjudication of the Federal question was necessarily involved in the disposition of this case in the State Court and was certainly raised by implication, the entire defense being based on the contentions, first, that no crime had been committed and second, that the evidence was totally lacking in support of the crimes charged in the bill. With reference to this phase of the matter, the Supreme Court has held:

"It is not always necessary that the Federal question should appear affirmatively on the record or in the opinion, in order to give the Supreme Court of the United States jurisdiction to review a State judgment, if an adjudication of such question was necessarily involved in the disposition of the case in the State Court."

Kaukauna Water Power Co. v. *Green Bay & M. Canal Co.*, 142 U. S. 254, 12 Sup. Ct. Rep. 173.

In support of this proposition of law the petitioner desires to present the following discussion of the evidence and the North Carolina law pertinent thereto.

The Evidence on the Larceny Count Is Clearly Insufficient

The evidence is that any paper stolen was taken by one or all of the four negro truck drivers who were working for the petitioner on a commission basis, collecting paper where and when they pleased, delivering it to the petitioner, and being paid so much per pound upon delivery (R. 26). There is not a scintilla of evidence that the petitioner was present at the time of the alleged theft, participating, aiding or abetting, or that he advised or procured the commission of the alleged crime. The negro truck drivers were present in Court as State's witnesses but the State refused to offer or tender their testimony, thus leaving the evidence as to the alleged participation of the petitioner in the crime of larceny as silent as the tombs of Egypt. In the opinion of the Court in the case at bar, it is stated, "The testimony does not show that the defendant personally participated in the taking or removal of any of the property." The motion for judgment as of non-suit on this count should have been allowed and the count stricken from the bill. The North Carolina Supreme Court has consistently held this to be the law, quoting:

> "In order to convict a defendant of larceny when the evidence discloses that he was not present at the commission of the crime, it is necessary to prove that the defendant either advised or procured the commission of the crime or aided or abetted in the commission."
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> *State* v. *King*, 222 N. C. 239; 22 S. E. 2d 445
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> "Where the State's evidence tends to show the actual theft of the goods in question by others and fails to connect the defendant therewith in any manner until after the goods had been asported, the *presumption* arising from the defendant's recent possession of

goods a short time thereafter is *insufficient* to justify the submission of the question of the defendant's guilt of larceny to the jury."

State v. *King*, 222 N. C. 239; 22 S. E. 2d 445
State v. *Cannon*, 218 N. C. 466; 11 S. E. 2d 301

Likewise, the Evidence on the Receiving Count Is Insufficient, Particularly As to the Value of the Property

The Supreme Court of North Carolina held in its opinion in this case (R. 88), quoting:

"It was necessary for the State to show the value of the property taken or *received* to be more than $50.00. in order to establish the commission of a felony under the statute as charged in the bill of indictment. G. S. 14-72."

The evidence as to the ton price of the paper involved is that it was worth $14.00 per ton (2,000 lbs.) (R. 16). The only paper actually identified in the possession of the petitioner were eight magazines weighing probably less than two pounds (R. 44). It is true that the various witnesses were allowed to testify as to the large number of pounds of paper that the petitioner had in his warehouse and the jury was allowed to guess that the petitioner had stolen or received all of this paper as stolen paper. This was done over the objection of the petitioner and the petitioner contends that this incompetent evidence supplied the totally insufficient evidence of the State as to the value of the paper alleged to have been received. The witness D. A. Gay testified (R. 43) that he found a red truck of the petitioner broken down on Blount Street in Raleigh, loaded with about 1600 pounds of paper from which he extracted several magazines identified by various citizens as having been placed by them on the curb for the paper drive. The value of this paper could not have

been more than $14.00, assuming that all of it was stolen paper. And the Court's attention is called to the fact that the petitioner never *received* this truck load of paper. The deficiency of the State's evidence as to the value of the paper alleged to have been received was further supplied by the incompetent evidence of the witness G. A. Moore (R. 9 through 11 inclusive). Over the objection of the petitioner, this witness was allowed to testify that on Sunday afternoon he made a survey of the Hayes Barton area of the city and saw 60,000 to 75,000 pounds of paper on the street, that he made another inspection Monday morning and that the paper was missing. Witness testified on cross-examination (R. 17) that he charged Weinstein with the theft of all of this paper and at the same time admitted that the paper drive had been postponed from Sunday at 1:00 p. m. to Monday at 1:00 p. m. on account of rain and that the people were notified by spot flashes over the radio. Naturally many people carried the bundles of paper back into their houses to prevent its ruin by rain. This witness was simply allowed to guess that the petitioner and/or the negro truck drivers stole all of this paper and that the petitioner received all of it, knowing it to be stolen property. Many other witnesses, as the record shows, were allowed to give similar incompetent evidence. The State failed utterly to prove by competent evidence the value of the allegedly stolen paper allegedly received by the petitioner to be more than $50.00. And the petitioner respectfully contends that for this reason his motion for judgment as of non-suit as to this count should have been allowed and the case dismissed.

Conclusion

Briefly posed, the question is: Has the petitioner been denied his rights under the due process clause of the Four-

teenth Amendment to the Constitution of the United States? For the reasons above set forth the petitioner respectfully contends that the answer should be in the affirmative.

Respectfully submitted,

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